FILE COPY

JUN 29 193

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 192

HERBERT LESTER TYSON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

J. MELVILLE BROUGHTON,
Counsel for Petitioner.

INDEX.

Subject Index.

	Page
Petition for writ of certiorari	1
A. Summary statement of the matter involved	1
B. Reasons relied on for the allowance of the writ	4
Prayer for writ	4
Brief in support of petition	5
I. Opinion of the court below	5
II. Jurisdiction	5
III. Statement of the case	6
IV. Specifications of error	6
V. Argument	7
1 The Circuit Court erred in holding that the suspension of the statute of limitations ceased upon the denial of the claim by the director and not that it ceased upon receipt of notice by the insured of such denial	7
2. The Circuit Court erred in holding that the insured should have instituted suit on the same day on which he received notice of the denial	11
3. The Circuit Court erred in reaching a determination which conflicts directly with its decision in Weaver v. U. S., 72 F. (2d) 20, and conflicts in principle and application with decisions of the same and other circuits	11
Conclusion	12

Authorities Cited.

Albek v. U. S., 4 F. Supp. 1020	9
American Tobacco Co. v. Weckmeister, 207 U. S. 284, 52 L. Ed. 208	9
Bloomer v. McQuan, 14 Howard 537, 14 L. Ed. 533	10
Creasy v. U. S., 4 F. Supp. 175	9
Crouch v. U. S., 266 U. S. 180, 69 L. Ed. 233	6
Kohlsaat v. Murphy, 96 U. S. 153, 24 L. Ed. 844	9
Royal Indemnity Co. v. American Bond & Mortgage Co., 289 U. S. 167, 77 L. Ed. 1100	10
Sorrells v. U. S., 287 U. S. 445, 77 L. Ed. 419	10
U. S. v. Collins, 61 F. (2d) 1002	8
U. S. v. Jackson, 280 U. S. 184, 74 L. Ed. 361	10
U. S. v. Knott, 69 F. (2d) 907	8
U. S. v. Rimer, 220 U. S. 547, 55 L. Ed. 578	6
Weaver v. U. S., 72 F. (2d) 20	6, 11, 12
Wilson v. U. S., 70 F. (2d) 175	8

Acts Cited.

Section 240 (a) of Judicial Code, as amended by Act Feb. 1, 1925, Chapter 229, Section 1, 43 Stat. at L. 938, U. S. C. A., Title 28, Section 347	5
Section 19, Chapter 320, 43 Stat. 612, as amended by Section 1, 45 Stat. 964, Chapter 849, Section 4, 46 Stat. 992, U. S. C. A., Title 38, Section 445	1, 6, 8

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 192

HERBERT LESTER TYSON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

MAY IT PLEASE THE COURT:

The petition of Herbert Lester Tyson respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved.

This cause involves only questions of law arising out of the legal construction and effect of Chapter 320, Section 19, 43 Stat. 612 (Title 38 U. S. C. A. Sec. 445), known as the

War Risk Insurance Act, as amended May 29, 1928, #1, 45 Stat. 964; July 3, 1930, c. 849, #4, 46 Stat. 992.

The pertinent section of the statute is:

> "No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after July 3, 1930, whichever is the later date, and no suit on United States Government life (converted) insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made: Provided, That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: Provided further, That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. * * *"

This action was instituted on November 17, 1932, and asked for a recovery on a policy of War Risk Insurance. The suit was dismissed by the District Court for lack of jurisdiction on the grounds that the suit was not instituted within the time required by statute.

The facts with respect to the filing and rejection of the claim sued upon are as follows:

On December 2, 1930, in response to a request of the insured the Veterans Administration wrote a letter to the insured advising him that the local rating board was of the opinion that he was not entitled to compensation. With this letter were enclosed forms 526-c and 526-f, which insured was directed to execute and return if he desired to apply for disability allowance. Insured executed and forwarded these forms to the Veterans Administration by which they were filed on December 12, 1930.

On July 2, 1931, insured executed and mailed to the Veterans Administration a claim on Form 579 (Exhibit B) for insurance benefits under his policy, claiming that he had been totally and permanently disabled since September 10, 1918. This claim was filed in the Veterans Bureau on July 3, 1931. The director by letter dated November 12, 1932, denied the claim and advised the insured:

> "You may consider such denial final for the purposes of instituting suit under section 19 of the World War Veterans Act, 1924, as amended. If you accept the denial of the claim by the Council as final, the suspension of the statute of limitations provided by Section 19 shall cease from and after the date of this letter plus the number of days usually required by the Post Office Department for the transmission of regular mail from Washington, D. C. to your last address of record."

This letter bore a Washington, D. C. post mark of November 14, 1932, and was received by the insured at his home on November 16, 1932. The suit was commenced in the District Court of the United States for the Eastern District of North Carolina, Raleigh Division, on November 17, 1932.

Upon the foregoing facts the District Court dismissed the action for lack of jurisdiction and the Circuit Court of Appeals affirmed the judgment of the District Court. The Circuit Court held that the claim is denied by the director "when he takes action denying it, not when notice of the denial is received by the insured."

Tyson v. *United States,* 76 F. (2d) 533.

The Circuit Court further held that if the date of receipt of the letter by the insured be taken as the last date of the suspension of the statute of limitations, the suit was properly dismissed as the time for bringing the suit expired on the same date.

B.

Reasons Relied on for the Allowance of the Writ.

Petitioner relies upon the following reasons for the issuance of the writ:

1. The Circuit Court of Appeals has decided an important question of Federal Law which has not been, but should be, settled by the Supreme Court of the United States.

2. The Circuit Court of Appeals has decided a Federal question in conflict with the applicable decisions of the Supreme Court of the United States.

3. The decision of the Circuit Court of Appeals in the instant case conflicts with its own decision in *Weaver* v. *U. S.*, 72 F. (2d) 20.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 3811, *Herbert Lester Tyson, Appellant,* v. *United States of America, Appellee,* and that the said judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HERBERT LESTER TYSON,
By J. MELVILLE BROUGHTON,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 192

HERBERT LESTER TYSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit dated April 2, 1935, is reported in 76 F. (2d) 533, and is found at pages 21 to 25 of the record.

II.

Jurisdiction.

1. Jurisdiction is sustained by Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925,

Chapter 229, Section 1, 43 Stat. at L. 938; U. S. C. A. Title 28, Section 347.

2. Judgment of the court below was entered under date of April 2, 1935, less than three months prior to the filing of this petition for writ of certiorari.

3. The suit was brought under authority of Chapter 320, Section 19, 43 Stat. 612; U. S. C. A. Title 38, Section 445, as amended Section 1, 45 Stat. 964, Chapter 849, Section 4, 46 Stat. 992.

4. The nature of the case and the ruling of the court below are such as to bring the case within the jurisdictional provisions relied on.

5. Cases believed to sustain jurisdiction:

U. S. v. *Rimer,* 31 S. Ct. 596; 220 U. S. 547, 55 L. Ed. 578;

Crouch v. *U. S.,* 45 S. Ct. 71; 266 U. S. 180, 69 L. Ed. 233.

III.

Statement of the Case.

A full statement of the case has been given under the heading A in the petition, and for the sake of brevity the statement is not repeated at this point.

IV.

Specifications of Error.

1. The Circuit Court erred in holding that the suspension of the statute of limitations ceased upon denial of the claim by the director and not that it ceased upon receipt of notice by the insured of such denial.

2. The Circuit Court erred in holding that the insured should have instituted suit on the same day on which he received notice of the denial.

3. The Circuit Court erred in reaching a determination which conflicts directly with the decision in *Weaver* v. *U. S.*, 72 F. (2d) 20 and conflicts in principle and application with decisions of the same and other circuits.

V.

ARGUMENT.

1. The Circuit Court erred in holding that the suspension of the statute of limitations ceased upon denial of the claim by the director and not that it ceased upon receipt of notice by the insured of such denial.

As set forth in the record herein the decision of the Circuit Court of Appeals held that suspension of the statute of limitations ceased upon the denial of the claim and not when the insured received notice of the decision of the director.

In order to prosecute his suit it was necessary that petitioner file with the Bureau his claim for insurance benefits under his policy of War Risk Insurance. Upon a denial of this claim by the director or someone acting in his name the insured was authorized to commence suit in the United States District Court against the United States. The action of the director upon the claim was a condition precedent to instituting a suit under the provisions of this statute. Section 1 of the statute provides:

> "In the event of disagreement as to claim, including claim for refund of premiums, under a contract of insurance between the bureau and any person or persons claiming thereunder an action may be brought against the United States either in the Supreme Court of the District of Columbia or in the District Court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies."

"Disagreement" is defined to mean "a denial of the claim by the director or someone acting in his name." U. S. C. A. Title 38, section 445.

In construing these sections of the statute the courts have been uniform in holding that disagreement was a condition precedent to instituting the action.

> "It is clear that the District Court has no jurisdiction to entertain the suit in the absence of proof of the existence of the disagreement prior to the bringing of the suit."
>
> *U. S.* v. *Collins* (C. C. A. 4th) 61 F. (2d) 1002.
> *U. S.* v. *Knott* (C. C. A. 6th) 69 F. (2d) 907.
> *Wilson* v. *U. S.* (C. C. A. 10th) 70 F. (2d) 176.

In the absence of the letter of denial from the director of the Bureau petitioner would have been unable to show the required disagreement. The disagreement forms the actual basis of the suit and could only be shown by the letter of denial from the director.

Congress in defining disagreement and making it a condition precedent to instituting a suit on these policies of insurance could not have intended that the disagreement became a fact at the instant of the denial by the director. Such an intention would have limited the application of this statute to such veterans who only could have acquired knowledge of the act of the director and would have rendered null the benefits intended.

The duty of beginning the suit did not arise, therefore, until notice of the denial had been communicated to the insured. Without such notice there could have been no disagreement.

> "If the act of denial of the claim imposes upon the veteran the condition that he must sue within a limited time thereafter, surely, he cannot be expected to comply with this condition until such time as he has knowledge of the denial of his claim. In fact he cannot sue until

he knows that his claim has been denied and is no longer under consideration at the Bureau. Only after he has received notice of the denial can he allege the disagreement which is essential to the maintenance of a suit. The claim is to be taken as denied on the date when the claimant received the letter informing him of denial."

Creasy v. *U. S.* (D. C. Va.) 4 F. Supp. 175.
Albek v. *U. S.* (D. C. N. Y.) 4 F. Supp. 1020.

Any other interpretation of the statute in question would defeat the very objects sought to be obtained. Under the rules of construction of statutes it is settled that "the intention of the lawmaker is to be deducted from a view of every material part of the statute * * *."

Kohlsaat v. *Murphy,* 96 U. S. 153; 24 L. Ed. 844.

Construing the section relating to the suspension of the statute of limitations with the section requiring disagreement as a condition precedent to instituting the suit, it clearly appears that Congress intended that the insured should have notice of the denial.

The Court is not confined to a literal reading of the statute, but "may consider its objects and purposes, the things with which it is dealing and the condition of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact."

American Tobacco Co. v. *Werckmeister,* 207 U. S. 284; 52 L. Ed. 208.

Statutes are not construed so as to result in inequalities or absurdities, and to impose upon the insured the necessity of showing disagreement and at the same time denying the means of obtaining knowledge of the disagreement

within the time limited would result in inequalities and produce an absurdity.

Sorrells v. *U. S.*, 287 U. S. 445; 77 L. Ed. 419.
Bloomer v. *McQuan,* 14 Howard 537; 14 L. Ed. 533.
Royal Indemnity Co. v. *American Bond & Mtg. Co.*, 289 U. S. 167; 77 L. Ed. 1100.

The same court held in *Weaver* v. *U. S.* (C. C. A. 4th) 72 F. (2d) 20, that "the statute of limitations was suspended for the number of days prior to and including July 3, 1931, that the claim was pending in the Bureau, and the plaintiff was entitled to bring suit within that number of days after notice of disallowance of his claim by the bureau." The decision in the *Weaver* case was based on facts similar to these in the instant case except that plaintiff in the *Weaver* case failed to bring his suit until several days after receipt of notice of denial.

It has been held in this Court that great weight is to be given to the construction consistently given to a statute by the department charged with its administration unless the construction is clearly wrong or unless a different construction is plainly required.

U. S. v. *Jackson,* 280 U. S. 183; 74 L. Ed. 361, and cases therein cited.

The Veterans Bureau in its letter to petitioner stated that the suspension of the statute would cease upon the denial by the director plus the number of days usually required by the Post Office Department to transmit the letter to insured's last known address. Similar statements were contained in letters of denial in other cases arising under this statute. It is plain therefore that the Veterans Bureau construed the statute so as to allow notice to the insured before the suspension should cease.

It is to be observed that in this case the letter of denial although dated November 12, 1932, was postmarked November 14th, 1932. This lapse of two days which in the opinion of the Circuit Court marked the expiration of insured's right to proceed under the statute certainly is not chargeable to insured. The construction of this statute as given by the Circuit Court in this case results in a grave injustice to those whom the statute should benefit.

2. The Circuit Court erred in holding that the insured should have instituted the suit on the same day on which he received notice of the denial.

It is submitted that under any rule for computing time that insured had one day after receipt of notice in which to commence his suit. The statute clearly includes July 3, 1931, as one of the days to be included and if the claim is filed on July 3, 1931, then insured had one day after receipt of the letter of denial in which to commence his suit. It is only by excluding July 3, 1931, that any other conclusion may be reached. Even if fractions of days be included in the calculation it is contended that insured brought his suit within the time contemplated by the statute.

The *Weaver* case, hereinbefore cited, clearly holds that July 3, 1931, is to be included in calculating the time within which insured must commence his suit. And in that case the Court indicated that if the claim had been filed on July 3, 1931, the plaintiff would have had one day after receipt of notice of denial in which to institute his suit.

3. The Circuit Court erred in reaching a determination which conflicts directly with its decision in Weaver v. U. S., 72 F. (2d) 20, and conflicts in principle and application with decisions of the same and other circuits.

It is submitted that the decision of the Circuit Court in the instant case is clearly in conflict with the decision of the same court in the *Weaver* case. Certainly as to time when the suspension of the statute of limitations ceased the two cases are in conflict. And by direct implication the two cases are in conflict with respect to the number of days remaining to the veteran in which to institute suit after notice of the disallowance.

It is earnestly contended that an application of the decision in the *Weaver* case to the facts in this case can only result in a reversal of the decision of the Circuit Court. The decisions in the instant case are not in accord either with the decisions of this Court or with the decisions of the Circuit Courts of Appeals as to the proper construction of the statute in question.

Conclusion.

It is therefore respectfully submitted that this Court should grant the petition for the writ of certiorari in order that it may review the decision of the Circuit Court of Appeals and finally reverse it and remand this cause to the District Court for trial upon its merits.

Respectfully submitted,

J. MELVILLE BROUGHTON,
Counsel for Petitioner.